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Negligence--Theatres--Fire--Question for Jury (Tapley v. Ross Theatre Corp., 275 N.Y. 144 (1937))

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co-participant will be imputed to him, thereby barring recovery.¹⁰ The mere fact that the parties are fellow servants acting within the scope of their authority does not, of itself, make them co-participants in a joint enterprise,¹¹ unless there is, in addition, the equal right of control, which in the instant case was lacking. Furthermore, the courts have limited the application of joint enterprise to actions against third parties,¹² so that it is not applicable in a suit brought by one of the co-participants against the other. In the latter event the negligence of the driver is not imputed to the occupant.¹³

J. L. C.

NEGLIGENCE—THEATRES—FIRE—QUESTION FOR JURY.—Plaintiffs sue to recover for personal injuries sustained in a fire at defendant's theatre. Two employees of defendant, upon discovering the fire, did not use the extinguishers at hand, but ran up the aisles in an attempt to reassure the panic-stricken patrons. While the fire spread, the theatre was lighted and the doors were thrown open. The suit was based solely upon the failure to use the extinguishers and supervise the exit of the patrons. Defendant contended that in the light of the emergency this was not evidence of negligence. Over his objection, the trial court submitted the question of negligence to the jury. On appeal from a judgment in favor of plaintiff, *held*, affirmed. It was for the jury to ascertain what was negligence and whether it was proved. *Tapley v. Ross Theatre Corp.*, 275 N. Y. 144, 9 N. E. (2d) 812 (1937).

The degree of care required of theatre and movie houses is the same as that required of amusement places in general.¹ Such places are not insurers of the safety of their patrons,² nor are they held to the strict accountability of common carriers of passengers.³ They

¹⁰ *Harris v. Uebelhoefer*, 76 N. Y. 169 (1879); *Donnelly v. Brooklyn City R. R.*, 109 N. Y. 16, 15 N. E. 733 (1888).

¹¹ RESTATEMENT, TORTS (1934) § 491, comment d.

¹² HARPER, LAW OF TORTS (1933) § 148; *O'Brien v. Woldson*, 149 Wash. 192, 270 Pac. 304 (1929); (1929) 13 MINN. L. REV. 71.

¹³ *Bailey v. Jourdan*, 18 App. Div. 387, 46 N. Y. Supp. 399 (2d Dept. 1897); *Geary v. Metropolitan St. Ry.*, 84 App. Div. 514, 82 N. Y. Supp. 1016 (1st Dept. 1903), *aff'd*, 177 N. Y. 535, 69 N. E. 1123 (1903).

¹ *Grand Morgan Theatre Co. v. Kearney*, 40 F. (2d) 235 (C. C. A. 8th, 1930); *Seabridge v. Poli*, 98 Conn. 297, 119 Atl. 214 (1922); *Bennetts v. Silver Bow Amusement Co.*, 65 Mont. 340, 211 Pac. 33 (1922).

² *Ingersoll v. Onondaga Hockey Club*, 245 App. Div. 137, 281 N. Y. Supp. 505 (3d Dept. 1935); *Rich v. Madison Square Garden Corp.*, 149 Misc. 123, 266 N. Y. Supp. 288 (1933).

³ *Firszt v. Capitol Park Realty Co.*, 98 Conn. 627, 120 Atl. 300 (1922); *Williams v. Mineral City Park Ass'n.*, 128 Iowa 32, 102 N. W. 783 (1905).

owe only the duty of exercising ordinary or reasonable care.⁴ Such care includes the duty to see that the premises are in a reasonably safe condition⁵ and to provide an adequate number of attendants.⁶

The fact that an emergency arises does not relieve the amusement owner of the obligation to exercise ordinary care,⁷ but it is a circumstance to be considered in determining what is ordinary care.⁸ Emergencies have made the rule of ordinary care, in its application, less stringent,⁹ for men, in times of great stress, are not held to the strict responsibility of those who act deliberately;¹⁰ "nor will they be penalized because they do not do what, in the light of subsequent events, or in theory, would have avoided the accident".¹¹ The mere non-performance of an act which, in the light of an emergency, seems desirable, does not necessarily show a legal duty to perform it, or render the person failing to do so guilty of negligence.¹² Of course, where the crisis or strait is brought about by the defendant's own negligence, these rules do not apply.¹³

Although exigency may modify the duty of ordinary care it should be left to the jury to determine what it should be in any given situation.¹⁴ The question of negligence is for the jury and it should not be invaded by the court except in the clearest cases.¹⁵

A. P. W.

PLEADING AND PRACTICE—RIGHT OF CORPORATION TO APPEAR IN ACTION IN PERSON—SECTION 236 OF THE N. Y. CIVIL PRACTICE ACT.—The Mortgage Commission brought an action to foreclose a

⁴ O'Toole v. South Island Park Ass'n, 206 App. Div. 31, 200 N. Y. Supp. 502 (4th Dept. 1923); Dunning v. Jacobs, 15 Misc. 85, 36 N. Y. Supp. 453 (1895).

⁵ Rienzi v. Tilyou, 252 N. Y. 97, 169 N. E. 101 (1929).

⁶ Griswold v. Ringling, 221 N. Y. 705, 117 N. E. 1069 (1917) *semble*; Ward v. F. R. A. Operating Co., 265 N. Y. 303, 129 N. E. 585 (1935) *semble*.

⁷ Mississippi C. R. R. v. Aultman, 173 Miss. 672, 160 So. 737 (1936).

⁸ National Life Ins. Co. v. McKenna, 226 Fed. 165 (C. C. A. 8th, 1915).

⁹ Hull v. Taine, 173 So. 701 (Fla. App. 1937); Louisville & N. R. R. v. Wright, 193 Ky. 59, 235 S. W. 1 (1921); Fernald v. French, 121 Me. 4, 115 Atl. 420 (1921); Verney v. Springfield St. Ry., 210 Mass. 63, 96 N. E. 79 (1915).

¹⁰ Hartley v. Lasseter, 96 Wash. 407, 165 Pac. 106 (1917).

¹¹ *Ibid.*

¹² Cf. Draper v. Delaware & H. Canal Co., 118 N. Y. 118, 23 N. E. 131 (1885).

¹³ Caldwell v. Hughes, 18 Tenn. App. 355, 77 S. W. (2d) 117 (1935); Siegl v. Watson, 181 Wis. 619, 195 N. W. 867 (1923).

¹⁴ O'Brien v. New York C. R. R., 185 App. Div. 867, 174 N. Y. Supp. 116 (1st Dept. 1919).

¹⁵ Moore v. Westervelt, 21 N. Y. 103 (1860); Rocky Mountain Fuel Co. v. Tucker, 72 Colo. 308, 211 Pac. 283 (1922); Reichle v. Philadelphia Rapid Transit Co., 241 Pa. 1, 88 Atl. 79 (1913).